SUPREME COURT, U.S.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 68.

NATHANIEL WRIGHT, et al.,
Petitioners,
vs.
GEORGIA.

On Writ of Certiorari to the Supreme Court of the State of Georgia.

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

QUESTIONS PRESENTED.

I.

Whether the conviction of petitioners for unlawful assembly denied them due process of law under the Fourteenth Amendment, when they were convicted on evidence which showed that they were grown Negro men who took over a playground in a predominantly white neighborhood at a time when the playground was reserved for and was to be used by school children and they refused to leave when requested by the police.

II.

Whether the decision below asserts any adequate nonfederal grounds for limiting consideration of an aspect of an important constitutional right where the court below determined that such right had been abandoned.

STATEMENT.

Petitioners were convicted of violating Section 26-5301, Georgia Code Annotated in that they did assemble in the County of Chatham on January 23, 1961 at Daffin Park for the purpose of disturbing the public peace and refusing to disburse (sic) on being commanded to do so by Sheriff, Constable and Peace Officer, to wit: W. H. Thompson and G. W. Hillis . . . (R. 8).

The State of Georgia introduced four witnesses, the first witness, Officer G. H. Thompson stated:

> When we arrived at this Basket Ball Court we found around seven colored boys playing basket ball there . . . (R. 39).
>
> They were pretty well dressed at that time; some of them had on dress shirts, some of them had on coats—not a dress coat, but a jacket. I didn't notice what particular type shoes they had on, as far as I know they didn't have "Tennis shoes" on. I am familiar with the type of shoes that people wear when they play basket ball, they didn't have that type of shoes on as well as I remember . . . (R. 39).
>
> I think that these defendants ranged in age from 23 to 32 . . . (R. 39).
>
> There is a school nearby this Basket Ball Court, it is located at Washington Avenue and Bee Road, I mean, at Washington Avenue and Waters. There is another school on 44th Street—there are two schools nearby; I believe that they are both "grammar" schools. I patrol that area and the children from these schools play there, they come there every day I believe, I believe they come there every afternoon when they get out of school, and I believe they come there during recess. The school, I believe, gets out about 2:30 in the afternoon, and this was around 2:00 o'clock . . . (R. 40).

> When I came up to these defendants I asked them to leave; I spoke to all of them as a group when I drove up there, and I asked them to leave twice, but they did not leave at that time. I gave them an opportunity to leave. One of them, I don't know which one it was, came up and asked me who gave me orders to come out there and by what authority I came out there, and I told him that I didn't need any orders to come out there. The children from the schools, would have been out there shortly after that. The purpose of asking them to leave was to keep down trouble, which looked like to me might start—there were five or six cars driving around the park at the time, white people. They left only after they were put under arrest, they were put under arrest approximately 5 to 10 minutes after I told them to leave. It seemed like to me that they were welcoming the arrests, because all of them piled into the car, Officer Hillis's car, at the time, and he had to stop them . . . (R. 40).

On cross-examination Officer Thompson further testified:

> Under ordinary circumstances I would not arrest boys for playing basketball in a public park. I have never made previous arrests in Daffin Park because people played basketball there . . . (R. 41).

On redirect he stated:

> There have been colored children in Daffin Park, but I did not arrest those children, but I arrested these people because we were afraid of what was going to happen. Colored children have played in Daffin Park, and they have fished there . . . (R. 42).

The next witness the State put up was Carl Hager, Superintendent of the Recreational Department of the City of Savannah. He stated:

As Superintendent I am over all of the playgrounds in the City of Savannah, Chatham County, Georgia: that includes Daffin Park and all the other parks that have playgrounds. These playgrounds are mostly in neighborhood areas. There are neighborhood areas where colored families live, and neighborhood areas where white people live, we try to establish them in that manner, and, then there are certain areas where they are mixed to a certain extent. We have a playground in the Park Extension, and that is a mixed area for white and colored—a white section and a colored section—it is mostly white, but there are several colored sections within several blocks. The Daffin Park area, mostly around that area is mostly white. It has occurred, from time to time, that colored children would play in the Daffin Park area and in the Park Extension area, but no action had been taken, because it is legal, it is allowed, and nobody has said anything about it. The playground areas are basically for young children, say 15 to 16 and under, along that age group, we give priority to the playground to the younger children over the grown-ups, it made no difference as to whether they were white or colored. Anytime that we requested anyone to do something and they refused we would ask the police to stop in, if we would ask them to leave and they did not we would ask the police to step in. We have had reports that colored children have played in the Park Extension, but they were never arrested or told to leave . . . (R. 42-43).

On cross-examination, Mr. Hager stated in answer to questions:

I testified that if there was a conflict between the younger people and the older people using the park facilities the preference would be for the younger

people to use them, but we have no objection to older people using the facilities if there are no younger people present or if they are not scheduled to be used by the younger people . . . (R. 44).

It has been the custom to use the parks separately for the different races. I couldn't say whether or not a permit would or would not be issued to a person of color if that person came to the office the Recreational Department and requested a permit to play on the courts, but I am of the opinion that it would have been, we have never refused one, the request never has been made . . . (R. 45).

There is no minimum or maximum age limit for the use of basket ball courts, however, at the present time we have established a minimum a maximum age limit of 16 years for any playground area.

On redirect Mr. Hager further explained:

On school days these courts and the playground area at Daffin Park are available for only certain age groups and they are only used at that time of day by the schools in that vicinity, it is, more or less, left available for them, that is the way we have our recreation setup . . . (R. 46).

I would like to say that normally we would not schedule anything for that time of the day because of the schools using the total area there. The schools use the area during school hours. The Parochial School uses it during recess and lunch periods and also for sport, as also the Lutheran School, and the public schools bring their students out there by bus and at various times during school hours all day long, we never know when they are coming, and they use Cann Park the same way, I might add . . . (R. 47).

If it was compatible to our program we would grant a permit for the use of the basketball court in

Daffin Park to anyone regardless of race, creed or color, however, at that time of day it would not be compatible to our program . . . (R. 47-48).

Officer Hillis, the next witness for the State, stated as follows:

My name is G. W. Hillis. I am a police officer of the Savannah Police Department, and I was a member of and on duty with the Savannah Police Department on or about the 23rd day of January of this year; I was on duty then and I had on my police uniform. When I arrived there I saw the defendants, they were playing basketball. Officer Thompson talked to them first, and then I talked to them. I asked them to leave, Officer Thompson had already asked them, I heard him ask them. They did not leave, and they did not stop playing until I told them they were under arrest. We called the wagon (cruiser). Officer Thompson told them that they would have to leave, he told them that at first, and they did have an opportunity to leave after he told them that. He asked them to leave, and then I asked them to leave after I saw they wasn't going to stop playing, and when I asked them to leave one of them made a sarcastic remark, saying: "What did he say, I didn't hear him", he was trying to be sarcastic. When I told them to leave there was one of them who was writing with a pencil and looking at our badge numbers. They all had an opportunity to leave before I arrested them, plenty of time to have left, but I told them to leave, they wouldn't leave and I put them under arrest . . . (R. 49-50).

I am familiar with the fact that there are schools in that area, and that children would be out there in about 15 minutes to play in that area . . . (R. 50).

ARGUMENT I.

Petitioners Argue That the Statute Under Which They Were Convicted Was Too Vague and Indefinite to Provide an Ascertainable Standard of Guilt.

In their argument on this point, Petitioners seek to lead the court to believe that this statute is a statute that has rarely been used and they base this on the fact that there is a paucity of appellate decisions involving its construction. As pointed out in the opinion of the Georgia Supreme Court (R. page 52 at page 56) the crime of unlawful assembly is itself of common law origin.

To determine whether breach of the peace statutes are seldom used, I refer the court to the Uniform Crime Reports of 1961 printed by the United States Department of Justice which on page 30 carries Breach of the Peace as disorderly conduct in their records. On page 93 the chart shows that there were 468,071 arrests for disorderly conduct (Breach of the Peace) made in the United States during 1961. Other than the amount of people arrested for drunkenness this was by far the most common charge placed against individuals. As to whether such a charge was too vague and indefinite to warrant a conviction, page 86 of the report shows that there were 62.6% findings of guilty against all people arrested for disorderly conduct and 15.4% acquittals or dismissals. What is most probably true is that due to the antiquity of the crime "Breach of the Peace", it has rarely been challenged in the Appellate Courts.

In their brief petitioners refer to the case of **Samuels v. State**, 103 Ga. Appeals 66, 118 S. E. 2nd 231 (1961), as being the only Georgia case in which there has been a construction of this statute. In giving the court the facts in the **Samuels** case in order to try and place it within

the bounds of **Garner v. Louisiana**, 368 U. S. 157, 7 L. Ed. (2) 207, Petitioners left out what was said on page 66 which came after the fact was shown that they had sat down at the lunch counter that had been customarily reserved for white people only. "The personnel of the store informed the defendants that the lunch counter was closed, the lights over the counter were extinguished and the defendants were refused service. This action was taken because they were Negroes." In their opinion the court said (page 66), "Several witnesses testified that in their opinion the presence of the defendants at the lunch counter would tend to create a disturbance." A reading of the record in the Georgia Court of Appeals (Transcript of Record, page 19) showed that the witnesses referred to were the employees of the store, one of whom was a Mr. Tyson, who stated, "We had closed the counter and were no longer serving at that lunch counter. Ordinarily we would not have closed it up at that time of day. It would have remained opened normally until 10:00 that night and it was a result of the defendants being at the counter that we closed it." It was this witness's opinion that the defendants were creating a disturbance. Mr. Kline, the Manager, also stated that he wanted to keep the counter closed as long as there was any disturbance and he considered this a disturbance (Ga. Court of Appeals, Transcript of Record, page 20).

It is significant that Samuels was represented by the same attorneys who represent the Petitioners in this action and that they did not make any suggestion that the statute was unconstitutional.

As the respondent understands the argument of the petitioners, they are not arguing that the statute was unconstitutionally applied to them but that the statute itself is unconstitutional as being too vague and indefinite.

We, therefore, cite to the court the case of **Chaplinsky v. New Hampshire**, 315 U. S. 568, 86 L. ed. 1031, which involved a statute whose stated purpose was to preserve the public peace. The court on page 573 stated "The statute, as construed, does no more than prohibit the face to face words plainly likely to cause a breach of the peace by the addressee." The Petitioner in that case was claiming that the statute was limiting his freedom of speech. This court held that such a statute was not so vague and indefinite as to contravene the Fourteenth Amendment.

The case of **Fox v. The State of Washington**, 236 U. S. 273, 59 L. ed. 573 (1914), involved a violation of a Breach of the Peace statute. The highest court in the state of Washington held that the statute was not bad for uncertainty. This court, page 277, said, "We understand the State Court by implication, at least, to have read the statute as confined to encouraging an actual breach of law. Therefore, the argument that this act is both an unjustifiable restriction of liberty and too vague for a criminal law must fail."

We cite to the court a decision of the Court of Appeals of New York, **People v. Galpern**, 259 N. Y. 279, 181 N. E. 572, in which that court held: "The record shows that the arrest arose out of a dispute, conducted on each side quietly and without disorder, between a citizen, in this case a member of the bar, who asserted a right to stand upon the sidewalk of a street in quiet, orderly conversation with a group of friends, and a police officer, who asserted a right to direct, those who use the sidewalk to 'move on' when in his opinion they were obstructing the sidewalk." The defendant was convicted of a Breach of the Peace for failing to move on. The question involved is very much similar to the question involved here. On page 573 the court held "Even if we should find that the police officer's interference was unnecessary, and, in the circumstances,

ill-advised, we could not find that it was unauthorized. The defendant, knowing the character and standing of his group of friends and that they would not willingly annoy or offend others, might conclude that the interference was officious; the police officer without such knowledge might conclude that it was a useful precaution to avoid possible disturbance. The law authorized the officer to use his judgment. Friends may congregate on the sidewalk in an orderly group for a short conversation, without creating disorder or unduly offending or obstructing others, but they must 'move on' when a police officer so directs for the purpose of avoiding possible disorder which otherwise might ensue. The Legislature has provided that failure to obey such direction in itself is disorderly conduct. That provision tends to preserve public order on the streets of a great city."

Petitioners' brief argues that the determination of a **purpose** to disturb the public peace is left entirely to the discretion of the police, the courts and the jury (Brief of Petitioner, page 13). The question is now asked Petitioners: To whom would they suggest such a question should be left if not to the police, the courts and the jury? There are many cases where a jury and the courts must determine questions of this character as, for instance, "intent" and "malice".

The Petitioners in their brief, page 14, further state, "If the statute is considered without the benefit of the construction given it in the Samuels case, supra, it could not be known whether the law covered peaceful and orderly acts or merely outwardly disorderly conduct." This statement answers itself in that the petitioners recognize that the Samuels case had previously been decided and had construed the act so that they are unable to state that they were not aware of its construction.

This court has again recently held in the case of **Garner v. Louisiana**, 368 U. S. 157, 7 L. ed. (2) 207, at 216, "We are aware that the Louisiana courts have the final authority to interpret and where they see fit, to reinterpret that state's legislation." That case also involved the interpretation of a breach of the peace statute. This court on page 215 said, "We, of course, are bound by a state's interpretation of its own statute and will not substitute our judgment for that of the state's when it becomes necessary to analyze the evidence for the purpose of determining whether that evidence supports the findings of a state court."

The Petitioners have widened their argument from that stated in its original heading to the further point that the petitioners say that they were arrested solely because they were Negroes. During the trial of the case and on appeal below, petitioners consistently argued that they had gone there merely to play basket ball; whereas, the State of Georgia attacked the bona fides of this statement. At last on page 15 of Petitioners' Brief they admit that it may be regarded as "a profound, nonverbal expression of the impropriety of racial segregation in public parks". They then argue that this demonstration was within the range of freedom of speech as assured by the Fourteenth Amendment.

Surely taking over the playground does more than express their views and is similar to the sit-down strikes. The reasoning employed by the court in **National Labor Relations Board v. Fansteel Metal Corporation**, 306 U. S. 240, 83 L. ed. 627, expresses the feeling that is applicable to this case. At page 253 this Court said, "The employees had the right to strike but they had no license to commit acts of violence or to seize their employer's plant."

The State of Georgia is not denying the right of Petitioners to play upon public playgrounds. There is no evidence to support a finding that if the children weren't assigned the playground, the Petitioners could not have played. What Petitioners want this court to do is to overlook any and all other evidence in this case except that they were Negroes and that they were arrested.

There is no evidence to support such a statement as a "white basket ball court". That would mean a basket ball court reserved exclusively for whites. What the testimony does show (R. page 44) is that there are playgrounds in white areas and playgrounds in colored areas (R. page 44). Mr. Hager, Superintendent of the Recreational Department, testified that they tried to establish them in that manner, that there are two playgrounds that are in mixed areas. One of them being in Park Extension and the other in Wells Park (R. page 42). Mr. Hager further testified, "It has occurred, from time to time, that colored children would play in the Daffin Park area and in the Park Extension area, but no action had been taken **because it is legal**, it is allowed, and nobody has said anything about it" (emphasis ours) (R. page 43).

Officer Hillis stated, "There have been colored children in Daffin Park, but I did not arrest those children, but I arrested these people because we were afraid of what was going to happen. Colored children have played in Daffin Park and they have fished there" (R. page 42).

The Petitioners on cross-examination sought to develop that one of the reasons the Petitioners were arrested was because they were Negroes. This fact, in the policeman's eyes, added an additional reason for asking the Petitioners to leave since they had taken over the childrens' playground in an area surrounded by whites and there

was, therefore, more cause to recognize a possible disturbance. The Petitioners themselves now admit that maybe they weren't there to play basket ball but that they were there to put on what they called a demonstration.

The fault in the Petitioner's reasoning is that they have not shown that the park was segregated but the state on its own volition went out of its way to show that it was not segregated, as witnessed by the testimony of Mr. Hager, the Superintendent of Playgrounds. In trying to demonstrate their right to play, the Petitioners took away the rights of those for whom the playground had been set aside at that time.

The Petitioners have not shown that the exclusion of adults from the playground during these hours was an unreasonable exercise of discretion by the playground authorities. Petitioners by their precipitate action which they classify as a protest (Brief of Petitioners, page 22) could easily have inflamed the public. This court has held that park segregation is unlawful and rights of minorities are to be protected but with a right goes a corresponding duty that is to obey all reasonable requests of a police officer. As was said by Judge Lehman writing for the New York Court of Appeals in **People v. Galpern**, 259 N. Y. 279, 181 N. E. 572, "Failure, even though conscientious, to obey directions of a police officer, not exceeding his authority, may interfere with the public order and lead to a breach of the peace."

ARGUMENT II.

Petitioners Further Argue That the Judgment Below Does Not Rest Upon Adequate Non-Federal Grounds for Decision.

In their argument, Petitioners apparently expand this point to include the same point that is included in and argued under Argument I above. This is indicated by their first statement under Argument II, in which they state: "Initially it should be emphasized that the court below indisputably **did** consider and reject petitioners' due process claim under the Fourteenth Amendment . . . by asserting: 'However, by applying the well-recognized principles and applicable tests above-stated, we find no deprivation of the defendants' constitutional rights under the Fourteenth Amendment of the United States Constitution'." A careful reading of the decision below shows the statement attributed to the court below was in conjunction with their discussion relating to whether the statute, under which the Petitioners were convicted, was so vague the Defendants were not placed on notice as to what criminal act they committed. As was stated above, this point was covered in Argument I and for that reason will not here be gone into again.

The Petitioners here present the question of whether the court below followed its set rule in treating as abandoned any assignments of error not insisted upon by counsel in their briefs or otherwise. Here the discussion deals with the two assignments of error treated by the court below as abandoned. In the Petitioner's bill of exceptions to the court below these two assignments of error were on the judgment sentencing each petitioner (fourth ground) and on the denial of their motion for a new trial (third ground). In reference to these two

grounds in the court below the Petitioners cited no authority, made no argument or even a statement that such grounds were still relied upon. In view of the foregoing, the court below applied the applicable rule as laid down in **Henderson v. Lott**, 163 Ga. 326 (136 S. E. 403), and other cases cited in their decision and therefore correctly treated the questions as abandoned (R. 54).

We recognize that this Court will inquire into the adequacy of a decision on state procedural grounds to determine whether the procedural application involved was inconsistent with prior decided cases. **Staub v. City of Baxley**, 355 U. S. 313. Even in the face of the above clear rule the Petitioners have not cited to this Court one Georgia case to show that the rule laid down in **Henderson v. Lott**, supra, has been inconsistently applied.

Petitioners have apparently conceded that the above Georgia procedural rule has been consistently followed and therefore have attempted to show that the court below should be reversed for two reasons as follows:

1. "The court below did not exercise due regard for the general doctrine that every reasonable presumption is to be indulged against the waiver of a constitutional right."

2. In certain cases this Court has found refusals to pass upon federal issues to be unreasonable for reasons other than inconsistent procedural application.

The only case Petitioners cite as supporting the first of the above two reasons is **Glasser v. United States**, 315 U. S. 60, 70. The **Glasser** case in no way deals with the determination of a procedural question by a state court, but rather concerns itself in the referenced part with the appointment of specific counsel to assist Defendant in U. S.

District Court over his objection to the appointment. The holding of the case on this point is clearly stated on page 70. "To preserve the protection of the Bill of Rights for hard pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights."

We again reiterate that such is not the case here as the Petitioners had representation by counsel in the court below, to which representation they had expressed no objection.

The Petitioners next base their claim for reversal on what they allege to be an unreasonable refusal to pass upon federal issues.

We ask, is it unreasonable to be consistent? To ask the question is to answer it in that inconsistency would lead to uncertainty and to a lack of knowledge on how to protect one's rights.

Under the procedural rule involved all that is required is an insistence on the position taken, that is, let the court know what position is taken by argument on the question or by covering the question in the brief or by stating the assignment of error is insisted upon by counsel.

Petitioners say the above requirement is unreasonable under the decisions of this court in **Staub v. Baxley**, 355 U. S. 313; **Terre Haute I. R. Co. v. Indiana**, 194 U. S. 579, 589; **Union P. R. Co. v Public Service Commission**, 248 U. S. 67.

These cases are clearly distinguishable from the principle presented in this case. The **Union Pacific Railroad Company** case dealt with the question of whether a constitutional right had been waived by complying with the unconstitutional statute. This court in taking jurisdiction

predicated its action in doing so on duress by the State, which we submit is not an issue in the current case for Petitioners were afforded every opportunity to present and argue their case.

Terre Haute Railroad Co. also concerns a point not at issue here, i. e., untenable construction of a charter granted by the State and thus evading the Federal question.

In the **Staub v. City of Baxley** case this court found the non-federal grounds to be without any fair or substantial support and plainly untenable in that the Georgia court did not follow a long line of its own decisions in determining the procedural matter. The converse is true in the present case (R. 54).

Lawrence et al. v. State Tax Commission of Mississippi, 286 U. S. 276, cited by the Petitioners, simply held that the purported non-federal ground put forward by the state court for its refusal to decide the constitutional question was unsubstantial and illusory. Which is clearly not the same as the case now before this court.

The decision in the court below does not impede the assertion of federal rights, nor is it burdensome to require insistence upon the grounds of appeal. Furthermore, it is clearly shown that the rule of the court below to treat as abandoned points not insisted upon has been consistently applied.

It has been held many times by this court that a State Court has the power to decide the proper method of preserving Federal questions and such determination will bind this Court. **Herdon v. Georgia**, 295 U. S. 441; **Parker v. Illinois**, 333 U. S. 571; **Edelman v. California**, 344 U. S. 357; **Michel v. Louisiana**, 350 U. S. 91. In all of these cases this Court deferred to a state court's determination of its own procedural rules.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the judgment below should be affirmed.

Respectfully submitted,

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